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No. 84-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KEITH DEAN and CORNELIUS HARPER

Petitioners,

vs.

JACK DUCKWORTH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit correctly followed decisions of this Court in concluding that there was no denial of rights under the Sixth Amendment when counsel jointly represented co-defendants who presented interwoven alibis as their only defense and against whom the evidence of guilt is identical.

2. Whether the Seventh Circuit correctly found sufficient evidence of guilt based upon positive identification by the victim.

3. Whether the Seventh Circuit correctly found no denial of the right to a speedy trial when all delays (except two weeks) were at the request of Petitioners' counsel and with the knowledge of Petitioners and their parents.

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Respondent Jack Duckworth, Superintendent, Indiana State Prison, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause numbers 83-1664 and 83-1765 (consolidated) on July 31, 1984.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from a decision of the Seventh Circuit reversing an order granting relief by way of habeas corpus in an action filed under 28 U.S.C. § 2254.

B. Course of Proceedings Below

Petitioners were found guilty of kidnap, rape, and robbery, and were sentenced to terms of life, twelve years, and not less than ten years nor more than twenty-five years (R.139-40). Petitioners appealed their convictions and sentences to the Supreme Court of Indiana, which Court unanimously affirmed on April 14, 1982. *Dean v. State*, 433 N.E.2d 1172 (Ind. 1982). The opinion was supplemented on November 12, 1982, because the issue of sufficiency of the evidence was not directly addressed in the first opinion. *Dean v. State*, 441 N.E.2d 457 (Ind. 1982).

The petition for writ of habeas corpus was filed on July 9, 1982, in the United States District Court for the Northern District of Indiana, South Bend Division. The District Court found eight of the nine issues raised to be "wholly without merit," but granted relief on the issue of conflict of interest on the part of trial counsel for petitioners.

Respondent appealed from the decision of the District Court and petitioners cross-appealed. The Seventh Circuit consolidated the appeals.

After oral argument the Seventh Circuit issued its opinion reversing the District Court as to its grant of relief on the issue of conflict of interest and affirmed the District Court as to denial of relief on the other grounds raised.

The petitioners sought rehearing, with a suggestion for rehearing en banc. Rehearing was denied on October 22, 1984.

C. Statement of the Facts

The prosecutrix left a restaurant for home shortly after midnight of September 12, 1977 (Transcript of state court proceedings [hereafter "R"], p. 798). Two individuals in a car pulled into her driveway and asked for directions (R.800). After she returned to her own car, the driver pulled a "very large gun" and ordered her out of her car

(R.800-01). Each of the individuals had a weapon (R.802). After being driven some distance from her home, the prosecutrix was raped in the back seat of the car (R.805). Fifteen dollars was stolen from her purse (R.803). Following the rape, the prosecutrix climbed into the front seat, between the two, because she was less likely to be shot there (R.805).

The entire incident lasted more than an hour (R.807), along well-lighted streets (R.915-16), with the prosecutrix in the front seat of the car with both assailants for part of the drive (R.805) from where she could observe from a very close distance and from where she could see the face of each at all times (R.837). The identification of the petitioners in court was unhesitating and positive (R.809-10). All pre-trial identifications were positive (R.907-08). The only persons ever identified as the assailants are the petitioners (R.972-73).

The alibi presented by petitioners—each of whom testified at trial—was that each was at his own home at the time of the crimes. Each claimed to remember the particular date because Harper had been in a fight on a school bus and had a "busted mouth" and swollen lip (R.1129, 1166). This was sought to be supported by several other witnesses (R.983, 1011, 1016, 1033, 1059, 1069-70, 1086, 1092). The evidence as to the fight was presented not only to support the alibi, but also to show the "inaccuracy" of the positive identification, as the prosecutrix observed no swollen lip on either of her attackers. To counter this presentation, the State called the principal of Harper's high school. He established the date of the school bus incident as September 7, 1977 (R.1196, 1200), five days prior to the crimes. Since the injury took four or five days to heal (R.1129), the swelling was gone by the time of the crimes.

Prior to trial, each petitioner was given an *ex parte* polygraph examination by trial counsel (R.548). The results showed that one of the petitioners knew something

about the incident and were inconclusive as to the other (R.548). Prior to trial, the results were discussed with the petitioners (R.576), and with the parents or guardians of the petitioners (R.575). Prior to trial, counsel held sixteen conferences with petitioner Harper's father and six conferences with petitioner Dean's grandmother (R.531-32).

Immediately prior to trial, the following colloquy occurred:

BY THE COURT:

Q. Which of you is Cornelius Harper?

A. I am.

Q. Stand by the microphone. You are Cornelius Harper?

A. Yes.

Q. In this cause, you and your co-defendant, Keith Dean, who is present in Court are each represented by the same attorney. There is a possibility when two defendants charged with the same offense are represented by the same attorney that a conflict could develop because your defense and that of your co-defendant might be different. That may not be this case. In any event, are you satisfied that both you and your co-defendant can be represented by the same attorney?

A. Yes.

Q. You waive any possible conflict that might develop in that regard?

A. I don't understand your question.

Q. Are you stating now in Court that you are satisfied that your defense and your co-defendant's defense are similar or the same and can be handled by one attorney?

A. Yes.

Of Keith Dean:

Q. Are your answers the same or different?

A. They are the same.

(R.772).

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT CORRECTLY FOLLOWED DECISIONS OF THIS COURT IN CONCLUDING THAT THERE WAS NO DENIAL OF RIGHTS UNDER THE SIXTH AMENDMENT WHEN COUNSEL JOINTLY REPRESENTED CO-DEFENDANTS WHO PRESENTED INTERWOVEN ALIBIS AS THEIR ONLY DEFENSE AND AGAINST WHOM THE EVIDENCE OF GUILT IS IDENTICAL

The Seventh Circuit followed the standard set by this Court:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

In the present case, no issue was raised until well after trial. *Compare Holloway v. Arkansas*, 435 U.S. 475 (1978).

"Conflict" denotes hostility, collision, competition, encounter, opposition, incompatibility, strife, antagonism, inconsistency. Conflict is absent in this case.

Petitioners rely upon two areas to show the claimed conflict—pre-trial polygraph examinations and the alibi.

The polygraph examinations and results are not in evidence. The results were characterized by trial counsel as indicating that one petitioner knew something about the incident and were inconclusive as to the other (R.548).

After the pre-trial polygraph examination results were received by counsel, they were discussed with both Dean and Harper (R.576). Counsel talked to the parents about the possibility and effect of any conflict resulting from joint representation (R.575, 576-78). Petitioners were kept advised as to all aspects of their case, including evidence, witnesses, jury, and their own testimony (R.615). Prior to a change in lead counsel due to surgery, representation of new lead counsel was fully discussed with petitioners (R.596). Despite this full knowledge of all aspects of the case—including the polygraph results—neither petitioners nor their parents expressed concern about a potential conflict. When there is no suggestion of a potential conflict, the courts assume that the lawyer and his clients knowingly accept whatever conflict may exist. *Cuyler v. Sullivan*, *supra*, at 347; *United States v. Mandell*, 525 F.2d 671, 675-77 (7th Cir. 1975), *cert. denied* 423 U.S. 1049 (1976).

Petitioners suggest in their petition that counsel may have been precluded from rigorously cross-examining the petitioner who had some knowledge. This would have been foolhardy for counsel (even separate counsel) since petitioners' alibis were interwoven. Further, despite evidentiary proceedings with trial counsel on the stand at petitioners' behest, no inquiry was made along these lines. Having had the opportunity to produce evidence of the asserted reluctance or inability to probe one of petitioners, and petitioners having produced no evidence on point, one can only conclude that no such evidence exists.

The interwoven, joint alibi consisted of petitioners claiming to be together at the home of friends through the evening, eventually splitting up each to go to his own home. The alibis were not identical because each petitioner claimed to be in his own home at the time of the crimes. However, these alibis were supported through testimony of petitioners and several other witnesses as to the events earlier. The date was "remembered" by all witnesses because Harper was allegedly in a fight on a school bus that afternoon. Dean described that fight in some detail. Petitioners and their witnesses also testified to Harper's "busted" or swollen lip, not only to support their alibi but

also to mount a joint attack on the identification by the prosecutrix, since the swelling was considerable and she observed no such swelling. In fact, the school bus incident was days before the crimes and the swelling was gone by the time of those crimes.

Further, it must be kept in mind that the evidence against petitioners is identical. The prosecutrix immediately and positively identified both petitioners as her assailants. These are the only two persons whom she ever identified.

Based upon these facts, the Seventh Circuit correctly applied the standard set in *Cuyler v. Sullivan*.

II.

THE SEVENTH CIRCUIT CORRECTLY FOUND SUFFICIENT EVIDENCE OF GUILT BASED UPON POSITIVE IDENTIFICATION BY THE VICTIM

Petitioners assert that the Seventh Circuit failed or refused to consider what they contend to be strong evidence of innocence. On the contrary, the Seventh Circuit considered all of the evidence and thereupon upheld the convictions. The "evidence" cited by petitioners consists of some *ex parte* polygraph examinations conducted after trial, and certain statements from the brother of one of the petitioners.

The alleged confession of Richard Pickett and Larry Harper was not an admission at all. Except for the fact that the persons making the claim were not the convicted parties, the claims are little different from the common defense in many rape cases that the victim consented. This defense was never raised at trial, and the mere fact of the timing of the claim (together with the family relationship as between Larry and Cornelius Harper) makes the story unbelieveable. That the petitioners could sit in jail awaiting trial for over five hundred days before the brother of one of them would come forward with the "truth" stretches credulity beyond its limits. The attempt to secure

the release of Keith Dean and Cornelius Harper by such a ruse cannot be allowed. That the victim noted the elder Harper and Pickett as *resembling* her attackers is not unexpected. There is no doubt some family resemblance between the Harpers. It must be kept in mind that the victim positively identified only two people, the petitioners, as her attackers. She identified these two immediately and positively. Despite seeing several persons who had appearances "similar" to her attackers, the victim identified only petitioners as her attackers.

The polygraph results are inadmissible in Indiana. Further, the State had no opportunity to be present at the examinations and to determine the conditions under which they were administered. Finally, there is no indication of the examinations administered by petitioners' original counsel, and if a court were to determine this case based upon results of inadmissible tests, all of such results should be in the record.

Innocence is not irrelevant; it is not present in this case. The victim positively identified petitioners as her attackers. She identified only the petitioners as her attackers. The alibi defense presented by the petitioners was spurious. The evidence of guilt is very strong. All of the facts point to the guilt of the petitioners, and no admissible fact points to their innocence. This Court should therefore deny issuance of a writ.

III.

THE SEVENTH CIRCUIT CORRECTLY FOUND NO DENIAL OF THE RIGHT TO A SPEEDY TRIAL WHEN ALL DELAYS (EXCEPT TWO WEEKS) WERE AT THE REQUEST OF PETITIONERS' COUNSEL AND WITH THE KNOWLEDGE OF PETITIONERS AND THEIR PARENTS

The Sixth Amendment guarantees a defendant a right to a speedy trial. However, the constitutional guarantee is not an inflexible rule expressed in terms of days or months. One cannot view a speedy trial claim by looking at a

calendar. Instead, one must inquire into the function of the right in terms of the particular context and case. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). There are four factors to be considered: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right; and, (4) prejudice to the defense function. *Barker*, at 530. The test is not based upon merely counting days. The four factors must be weighed together, along with any other relevant circumstance. *Barker*, at 533.

Petitioners assert that the time was excessive and that no accounting was made of the reasons for delay. These two complaints are both answered by reference to the testimony of J. Michael Katz and James E. Daugherty, petitioners' trial counsel. The delays were—except for a two-week period—attributable to the defense. Delays were caused by waiting for a requested transcript of the hearing resulting in waiver of juvenile jurisdiction (R.534-35), depositions (R.535-37), and eye surgery of defense counsel (R.538, 541). No motion for speedy trial was ever made (R.586). No motion was made because the prosecution was ready to go to trial since the filing of the charges, but the defense was not ready (R.586-88). The only objection made was to a continuance from April 16, 1979, to April 30, 1979, which continuance was based upon a congested court calendar (R.95). Therefore, contrary to the contention of petitioners, the delays not only are accounted for but are attributable to the defense. The issue of prejudice likewise must be resolved against the petitioners because the reasons for the delays were so that the defense could be prepared.

Petitioners' claim of prejudice arises from the fact that one of them "grew into" the description allegedly given by the prosecutrix shortly after the crimes. Balancing this is the fact that there was (1) stipulation (R.1097) and (2) direct testimony (R.1162) as to the height and weight of Keith Dean on the date of the crimes and within six months thereafter. The point was the subject of so much testimony that reference to all of the pages in the transcript where defense counsel dwelled upon this point is virtually impossible. It was the center of the defense (R.601-03).

Defense counsel saw the issue in March of 1978, more than one year prior to trial, and got a jail official to measure Dean's height at that time, and convinced the State to stipulate as to that measurement.

Petitioners hang their hat primarily upon the "prejudice" resulting from the growth of one of them. Going into the consideration of the existence of prejudice is the question of whether the right to a speedy trial was asserted. Petitioners urge a totally different approach and contend that the right was never waived, but the issue in *Barker* is assertion rather than waiver. This is so because the failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial. *Barker*, at 532. This is so, in part, because assertion of the right is evidence of the existence of prejudice. *Barker*, at 531. In *Barker*, the defendant hoped to take advantage of the delays. *Barker*, at 534-35. In the instant case, petitioners took advantage of their delays by preparing their case, and therefore to assert the right would have been foolhardy on their part as their own trial counsel testified (R.586-88).

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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